Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

ORDER ON RECONSIDERATION OF FOURTH REPORT AND ORDER, AND FIFTH REPORT AND ORDER

Adopted: August 14, 2002 **Released: September 4, 2002**

By the Commission: Commissioner Martin approving in part, concurring in part, and issuing a statement.

I. INTRODUCTION

1. In the *Collocation Remand Order*,[1] the Commission, among other actions, required incumbent local exchange carriers (incumbent LECs) to provide cross-connects between collocated carriers upon reasonable request.[2] In this *Order on Reconsideration*, we address a petition for clarification or partial reconsideration of that decision.[3] Specifically, we make clear that nothing in our prior order disavows any federal jurisdiction we otherwise have under the Act to resolve cross-connect disputes. In addition, we conclude that, under section 203(a) of the Communications Act of 1934, as amended (Communications Act or Act),[4] incumbent LECs must include cross-connect offerings made under section 201 in federal tariffs. We further conclude that in certain limited circumstances incumbent LECs may rely on individual case basis pricing when establishing rates for cross-connects.

2. We also address in this *Fifth Report and Order* a number of additional collocation issues.[5] We find that federally mandated limits on the time period for which incumbent LECs and competitive local exchange carriers (competitive LECs) may reserve potential collocation space for future use are not warranted. Further, we conclude that disputes regarding the conversion of virtual collocation arrangements to physical collocation arrangements should be

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435 (2001) (*Collocation Remand Order*), *aff'd sub nom. Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002) (*Verizon v. FCC*).

[2] As used in this order, the term "cross-connects" refers solely to cross-connects between collocated carriers. We do not address other types of cross-connects, such as those between a collocated carrier and an incumbent LEC.

[3] Association for Local Telecommunications Services, e.spire Communications, Inc., KMC Telecom, Inc., McCleodUSA Telecommunications Services, Inc., and NuVox, Inc. (collectively, petitioners) jointly filed this petition on September 19, 2001.

[4] 47 U.S.C. § 203(a).

[5] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Rulemaking, 15 FCC Rcd 17806 (2000) (*Collocation Reconsideration Order* or *Second Further Notice*).

addressed on a case-by-case basis. Finally, we determine that, although point-of-termination bays (POT bays) constitute a technically feasible point of interconnection, an incumbent LEC may not compel collocators to interconnect through them.[6]

II. ORDER ON RECONSIDERATION

3. In the *Collocation Remand Order*, the Commission reevaluated provisions of its collocation rules on remand from the United States Court of Appeals for the District of Columbia Circuit.[7] The Commission addressed, among other matters, whether incumbent LECs are required to provision cross-connects between collocators.[8] The Commission concluded that while an incumbent LEC is not required to allow collocators to install and maintain cross-connects between their collocated equipment themselves, an incumbent LEC must nevertheless provide these cross-connects between two collocators upon reasonable request.[9] In reaching this conclusion, the Commission determined that the revised rule would minimize the intrusion into the incumbent LEC's property interests while furthering the procompetitive goals Congress set forth in section 251 of the Communications Act.[10]

4. The Commission relied on three separate statutory bases in promulgating the revised cross-connect requirement. First, the Commission required incumbent LECs to make cross-connects available pursuant to section 201(a) of the Communications Act.[11] In addition, the Commission concluded that an incumbent's refusal to provision cross-connects would be an unjust and unreasonable practice within the meaning of section 201(b) of that Act.[12] Finally, the Commission justified the requirement under section 251(c)(6) of the Act as part of the incumbent LECs obligation to provide for collocation on just, reasonable, and nondiscriminatory terms and conditions.[13] On June 18, 2002, the D.C. Circuit affirmed the *Collocation Remand* Order, including the cross-connect requirement.[14] The Court held that the parties challenging the cross-connect requirement had waived their right to challenge the Commission's reliance on section 201(b).[15] The Court ". . . thus affirm[ed] the Commission on that ground without reaching the question of whether the Commission had reasonably invoked either section 201(a) or 251(c)(6)'s 'terms[] and conditions' clause."[16]

5. Petitioners ask that we clarify or reconsider three aspects of our cross-connect requirement. First, petitioners ask that we make clear that parties may bring cross-connect

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6 We address three sets of comments in this item. Appendix A lists the parties that filed these comments.

7 *Collocation Remand Order*, 16 FCC Rcd at 15436, para. 1.

8 *Id.* at 15436, para. 2.

9 *Id.* at 15466, para. 60.

10 *Id.*

11 *Id.* at 15467, para. 62 (citing 47 U.S.C. § 201(a)).

12 *Id.* at 15472, para. 72 (citing 47 U.S.C. § 201(b)).

13 *Id.* at 15475-76, para. 79 (citing 47 U.S.C. § 251(c)(6)).

14 *Verizon v. FCC*, 292 F.3d at 911-12.

15 *Id.* at 911.

16 *Id.* at 912.

disputes to the Commission in the first instance.[17] Second, petitioners ask that we clarify that incumbent LECs must include their cross-connect offerings in the interstate tariffs they file with the Commission pursuant to sections 201, 202, and 203 of the Act.[18] Finally, petitioners ask that we preclude incumbent LECs from relying on individual case basis pricing when establishing rates for any type of cross-connect.[19] We address each of these claims below.

A. Federal Enforcement of Cross-Connect Requirement

6. In the *Collocation Remand Order,* the Commission stated that it "anticipate[d] that cross-connect disputes, like other interconnection related disputes, can be addressed in the first instance at the state level."[20] Petitioners assert that this language suggests that the Commission does not intend to enforce its cross-connect requirement itself, but instead intends to leave enforcement to the various state commissions.[21] Petitioners ask that we make clear that we retain and intend to exercise our jurisdiction to enforce the cross-connect requirement.[22] According to petitioners, federal enforcement will prevent costly and duplicative litigation, ensure consistent results across the states, and generally promote competition.[23] SBC and Verizon respond that the language cited by the petitioners merely reflects the complementary federal and state jurisdiction created by the Communications Act.[24] These commenters point out that the state commissions generally arbitrate interconnection disputes under section 252 of the Act. Therefore, according to SBC and Verizon, if a collocated competitive LEC orders a cross-connect under an interconnection agreement or the state tariff, the state commission has the authority under the Act to resolve any disputes, within the guidelines established by the Commission.[25]

7. As ASCENT correctly notes, the *Collocation Remand Order* acknowledged merely that when a cross-connect dispute arises within the context of an interconnection proceeding before a state commission, the state commission would have the jurisdiction to resolve the dispute and we anticipate that the state commission would do so.[26] To avoid any uncertainty, we clarify that nothing in that prior statement disavows any federal jurisdiction we otherwise have under the Act to resolve cross-connect disputes. Any specific questions would be addressed on a case-by-case basis in the event of a complaint.

[17] Petition at 3-7.

[18] *Id.* at 8; *see* 47 U.S.C. §§ 201-03.

[19] *Id.* at 8, n.13.

[20] *Collocation Remand Order*, 16 FCC Rcd at 15478, para. 84.

[21] Petition at 3. *But see* ASCENT Oct. 22, 2001 Comments at 2 (asserting that the *Collocation Remand Order* makes clear the Commission's intent to continue enforcing its rules, including the cross-connect rules).

[22] Petition at 3-7; *see also* Sprint Oct. 22, 2001 Comments at 2-5 (arguing that federal enforcement will provide needed uniformity in the interpretation, application, and enforcement of the cross-connect rules).

[23] Petition at 5.

[24] SBC Oct. 19, 2001 Comments at 4-6; Verizon Oct. 22, 2001 Comments at 2-4.

[25] SBC Oct. 19, 2001 Comments at 5-6; Verizon Oct. 22, 2001 Comments at 3.

[26] ASCENT Oct. 22, 2001 Comments at 3.

B. Federal Tariffing of Cross-Connect Requirement

8. Petitioners also ask that we clarify that incumbent LECs must file tariffs with the Commission for their cross-connect offerings.[27] Petitioners argue that federal tariffs would protect competitive LECs against undue costs and delays in obtaining cross-connects. SBC and Verizon maintain that only cross-connects provisioned pursuant to section 201 of the Act must be federally tariffed.[28]

9. We agree that incumbent LECs must file tariffs for cross-connect offerings made pursuant to section 201 at the federal level.[29] This is a necessary result of Section 203(a)'s mandate that all services subject to the Commission's jurisdiction under section 201 be federally tariffed.[30] In order to minimize any unnecessary regulatory burdens, however, we clarify that incumbents shall have the flexibility to include the rates, terms, and conditions under which they provide cross-connects in their expanded interconnection tariffs, stand-alone tariffs, or other appropriate federal tariffs.[31]

C. Pricing of Cross-Connects

10. Petitioners ask that we clarify that incumbent LECs may not apply individual case basis pricing to cross-connects.[32] A carrier provides facilities or services on an individual case basis when it provides them to a specific customer under rates, terms, and conditions that must be negotiated upon request of the service.[33] Petitioners assert that incumbent LECs are able to determine the unit costs of cross-connect facilities in all cases. Petitioners argue that incumbent LECs therefore can establish firm prices for cross-connects and that those prices must be cost-based.[34] In contrast, Verizon contends that there is no basis for the Commission to depart from its policy that carriers may use individual case basis tariffs as a transitional mechanism for new services.[35]

11. Based on the record before us, we decline to adopt a blanket rule against the use of individual case basis pricing for cross-connects. As Verizon indicates, we have previously concluded that individual case basis pricing is appropriate until a carrier acquires sufficient

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27 Petition at 8.

28 SBC Oct. 19, 2001 Comments at 7; Verizon Oct. 22, 2001 Comments at 2-3.

29 This requirement applies only to cross-connects between collocated carriers. As stated previously, *see* note 2, *supra*, we do not address in this Order cross-connects between a collocated carrier and an incumbent LEC.

30 47 U.S.C. § 203(a) (requiring common carriers to file federal tariffs containing schedules of charges for services together with the classifications, practices, and regulations affecting such charges); *see MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).

31 The Commission's rules require certain incumbent LECs to offer, as an interstate tariffed service, expanded interconnection for interstate special access services at their end offices, serving wire centers, and other specified points. 47 C.F.R. § 64.1401.

32 Petition at 8, n.13.

33 *Southwestern Bell Telephone Company Tariff F.C.C. No. 73*, Order Designating Issues for Investigation, CC Docket No. 97-158, 12 FCC Rcd 10231, 10242, para. 20 (1997).

34 Petition at 8, n.13.

35 Verizon Oct. 22, 2001 Comments at 4-5.

experience with a particular service to develop generally available rates.[36] We decline to depart from that policy by prohibiting such pricing for cross-connects in all instances because we are unable to determine, from the record before us, the extent to which generally available offerings at standardized rates will be possible. Moreover, individual case basis pricing may still be appropriate where there is not adequate experience to develop such rates. Although we expect that, as a general matter, incumbent LECs have sufficient experience with most forms of cross-connects to establish firm prices for them, there may be specific types of cross-connects (e.g., "lit fiber" cross-connects) with which incumbent LECs have little or no experience.[37] In such cases, individual case basis pricing may be appropriate until adequate experience is developed. In reaching this conclusion, we note that should demand for a particular type of cross-connect permit an incumbent LEC to developed standardized rates, we would expect the incumbent LEC to seek to amend its federal tariff to incorporate those rates. We also caution that incumbent LECs should not use individual case basis pricing to increase unnecessarily costs or delays in provisioning cross-connect arrangements. To the extent that incumbent LECs use individual case basis pricing to increase those costs or delays unnecessarily, we can deal with such instances on a case-by-case basis or revisit our decision to allow individual case basis pricing in this area.

III. FIFTH REPORT AND ORDER

12. In the *Second Further Notice*, the Commission sought comment on several collocation-related issues that the Commission has not yet addressed.[38] Among these issues, the Commission sought comment on whether it should adopt a national policy limiting the period for which potential collocation space can be reserved for future use. Commenters representing competitive LECs recommend more explicit and, in some cases, more stringent space reservation requirements, while incumbent LECs suggest we take no further action. Finally, parties to this proceeding ask that we clarify our policies regarding the conversion of virtual collocation arrangements to physical arrangements and the use of POT bays with physical collocation arrangements. We address each of these issues below.

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[36] Verizon Oct. 22, 2001 Comments 4-5. *See Expanded Interconnection with Local Telephone Company Facilities,* CC Docket No. 91-141, Memorandum Report and Order, 9 FCC Rcd 5154, 5178, para. 84 (1994) (subsequent history omitted); *see also* Public Notice, Common Carrier Bureau Restates Commission Policy on Individual Basis Tariff Offerings, 11 FCC Rcd 4001 (1995).

[37] *See, e.g.,* Verizon Oct. 22, 2001 Comments at 4-5 (citing Verizon Telephone Companies, Tariff FCC No. 1, Transmittal No. 99, Section 18.1.1(A) (Sept. 28, 2001)). "Lit fiber" refers to fiber-optic cable that has been equipped with electronic devices allowing it to send transmission signals. "Dark fiber" is fiber-optic cable that is not so equipped. Verizon states that, unlike the situation with "dark fiber" cross-connects, it has received no requests for "lit fiber" cross-connects and that it therefore has no experience providing them. Verizon Oct. 22, 2001 Comments at 4-5.

[38] *Second Further Notice*, 15 FCC Rcd at 17839, para 70. We note that other issues raised in the *Second Further Notice* were either addressed in the *Collocation Remand Order* or have been incorporated into other dockets. *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection,* Notice of Proposed Rulemaking, Docket No. 01-318, 16 FCC 20641, 20648, paras. 12-13 (2001) (incorporating issues regarding collocation provisioning intervals) (*Performance Measurement Notice*). We intend to address issues surrounding collocation at remote terminals, including collocation in increments of less than a rack or a bay, in a separate order. *See Second Further Notice,* 15 FCC Rcd at 17849-54, paras. 99-112. Finally, the Commission invited comment on rule changes that would encourage line sharing. Because the D.C. Circuit recently overturned the Commission's line sharing rules, we find that it would not be appropriate to consider further modifications to those rules at this time. *See United States Telecom Ass'n v. FCC,* Nos. 00-1012, *et al.* (D.C. Cir. May 24, 2002).

A. Space Reservation Policies

13. In the *Second Further Notice*, the Commission stated that a number of state commissions, notably the California Public Utility Commission, the Texas Public Utility Commission, and the Washington Utility and Transportation Commission, have taken steps to place limits on the prospective time period over which both incumbent LECs and collocators can reserve space in incumbent LEC premises.[39] The Commission stated its belief that the primary responsibility for resolving space reservation disputes lay with the states and therefore declined to adopt specific space reservation periods at that time.[40] The Commission, however, requested comment as to whether it should adopt a national space reservation policy that would apply where a state does not set its own standard.[41]

14. Several incumbent LECs oppose adoption of a national space assignment policy. They argue that each central office is unique and subject to zoning and permitting intervals that vary from state to state.[42] According to these incumbent LECs, no national rule could fully account for the broad range of variables affecting space reservations. In contrast, certain competitive LECs maintain that, in the absence of a national space reservation policy, incumbent LECs have the unfettered ability to foreclose entry into important central offices and thus unreasonably restrict competition in those states that do not regulate this area.[43] Certain of these commenters recommend that we adopt a default national policy based on the policies adopted by California, Texas, and Washington state commissions.[44] Arbros Communications, Inc., *et al.* specifically recommend that we limit the time periods for space reservation made by incumbent LECs to 12 months for transmission equipment, and to 18 months for all other equipment.[45]

15. Based on the record before us, we are not convinced that a national space reservation policy is needed at this time to ensure that requesting carriers obtain reasonable and nondiscriminatory access to potential collocation space. Because a variety of factors can impact the availability of central office space, we believe states continue to be in the best position to monitor this situation and adopt policies that best address the particular space reservation issues in that state. As we have noted, several states have already adopted space reservation policies.

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39 *Second Further Notice*, 15 FCC Rcd at 17855-56, para. 116.

40 *Id.* (citing *Collocation Reconsideration Order* at 15 FCC Rcd at 17833-34, para. 52).

41 *Second Further Notice*, 15 FCC Rcd at 17855-56, para. 116.

42 *See, e.g.*, BellSouth Oct. 22, 2000 Comments at 9; Verizon Oct. 22, 2000 Comments at 32.

43 *See, e.g.*, @Link Communications Oct. 12, 2000 Comments at 32-36; Covad Oct. 12, 2000 Comments at 47-48; CTSI Oct. 12, 2000 Comments at 48-49; Mpower Oct.12, 2000 Comments at 62-68. Mpower asserts that, prior to the implementation of a space reservation policy by the California Commission, Pacific Bell had reserved space for as long as 20 years for certain equipment. Mpower Oct. 12, 2000 Comments at 62.

44 *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project No. 16251, Order No. 59 Approving Revised Physical and Virtual Collocation Tariffs, at 3 (Tx. Pub. Util. Comm'n Oct. 29, 1999); *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Networks*, Decision 98-12-069, 1998 WL 995609, at 68-69 (Cal. Pub. Util. Comm'n 1998); *MFS Communications Co.*, Docket No. UT 960323, 1998 USWL 996190 (Wash. Util. & Trans. Comm'n 1998).

45 Arbros Communications, Inc., *et al.*, Oct. 22, 2000 Comments at 67.

To the extent the state commissions have not adopted specific periods for space reservations, we believe space reservation disputes should be resolved on a case-by-case basis.

B. Conversion of Virtual Arrangements to Physical Arrangements

16. Several competitive LECs urge us to require that incumbent LECs permit competitors to convert existing virtual collocation arrangements to physical collocation arrangements without moving those arrangements to space designated for physical collocation.[46] In contrast, certain incumbent LECs contend that we should not require that they allow such in-place conversions, arguing that such a requirement would effectively undermine the statutory distinction between virtual and physical collocation.[47]

17. Based on the record before us, we will not require, as a general matter, that incumbent LECs permit in-place conversions of virtual arrangements to physical arrangements. We conclude that commenters have not demonstrated that all existing virtual collocation arrangements can be appropriately converted to physical collocation arrangements. We therefore also conclude that a blanket rule might result in some physical arrangements occupying space that would otherwise be unsuited for physical collocation. At the same time, we recognize that, under section 251(c)(6), an incumbent LEC must provide for physical collocation "on terms[] and conditions that are just, reasonable, and nondiscriminatory."[48] Any disputes regarding whether an incumbent LEC complies with this standard in evaluating requests to move a virtual arrangement to part of the incumbent LEC's premises where physical collocation is allowed should be addressed on a case-by-case basis.

C. Point of Termination Bays

18. In the *Advanced Services First Report and Order*, the Commission adopted section 51.323(k)(2) of the Commission's rules, which provides that "[a]n incumbent LEC may not require competitors to use an intermediate interconnection arrangement in lieu of direct connection to the incumbent's network if technically feasible."[49] Verizon requests that we clarify that section 51.323(k)(2) does not preclude an incumbent LEC from requiring that collocators connect to the incumbent's network through a POT bay.[50]

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[46] *See, e.g.,* Covad Oct. 12, 2000 Comments at 36-38, Rhythms Oct. 12, 2000 Comments at 42. In a physical collocation arrangement, a competitor leases space in the incumbent LEC's premises for its equipment and the competitor has physical access to this space to install and maintain its equipment. In a virtual collocation arrangement, the competitor designates the equipment to be placed at the incumbent's premises but does not have physical access to the premises. Instead, the equipment is under the physical control of the incumbent LEC and the incumbent LEC is responsible for installing and maintaining the equipment. *Collocation Remand Order*, 15 FCC at 17812, para. 9.

[47] *See, e.g.,* Verizon Nov. 14, 2000 Reply Comments at 12-13.

[48] *See* 47 U.S.C. § 251(c)(6).

[49] 47 C.F.R. § 51.323(k)(2).

[50] Verizon March 25, 2002 Comments at 15-16; Letter from W. Scott Randolph, Director, Regulatory Affairs, Verizon, to Magalie R. Salas, Secretary, FCC, at 1 (filed Dec. 19, 2001) (*Verizon Dec. 19, 2001 Letter*). A POT bay is a piece of passive equipment placed between a collocator's equipment and an incumbent's main distribution frame to provide a point of interconnection between the two networks. *See* Harry Newton, *Newton's Telecom Dictionary* 542 (2001). The Common Carrier Bureau (now the Wireline Competition Bureau) invited comment on

(continued....)

19. Verizon asserts that the Commission has previously allowed incumbent LECs to require POT bays and that POT bays are not "intermediate interconnection arrangement[s]" within the meaning of section 51.323(k)(2).[51] Competitive LECs agree that in some circumstances there may be many advantages to interconnecting with an incumbent LEC's facilities through a POT bay.[52] Those commenters suggest, however, that in other circumstances the disadvantages of interconnecting through a POT bay may outweigh the advantages.[53] They argue that, contrary to Verizon's position, incumbent LECs may not properly require the use of POT bays, but instead must allow interconnection at any technically feasible point.[54]

20. By definition, a POT bay is not an "intermediate interconnection arrangement," but rather simply a convenient demarcation point between the incumbent LEC's facilities and those of the collocator. We therefore agree with Verizon that the prohibition against intermediate interconnection arrangements in section 51.323(k)(2) does not apply to POT bays. We note, however, that the Act mandates that incumbent LECs allow competitive LECs to interconnect at "any technically feasible point."[55] We therefore conclude that while incumbent LECs may offer interconnection through POT bays as one technically feasible method of interconnection with a collocated competitive LEC, they may not unilaterally require competitive LECs to interconnect through such an arrangement where other technically feasible points of interconnection are available.[56] We note, however, that although an incumbent LEC cannot unilaterally dictate the point of interconnection, this does not mean that a competitive LEC can dictate how the interconnection is implemented.[57] These matters are typically subject to negotiations between the parties.

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this area. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Public Notice, DA 02-506, CC Dkt No. 98-147, 67 Fed. Reg. 10659 (Com. Car. Bur. Mar. 8, 2002).

[51] Verizon March 25, 2002 Comments at 2-5, 6-9; *see also* SBC April 2, 2002 Reply Comments at 1-3 (arguing that collocators are not entitled direct access to incumbent LEC networks in general and main distribution frames in particular).

[52] *See, e.g.*, AT&T March 25, 2002 Comments; Sprint March 25, 2002 Comments.

[53] ASCENT March 25, 2002 Comments at 1-3; AT&T March 25, 2002 Comments, at 6-7; Sprint March 25, 2002 Comments at 1.

[54] Sprint March 25, 2002 Comments at 1-2. Potential disadvantages include forcing the collocator to incur additional costs for the cabinet, floor space and cabling associated with a POT bay; increasing the risk of installation errors; and increasing the security risks for a collocator if other collocators share the POT bay. *Id.* at 2.

[55] 47 U.S.C. § 251(c)(2)(a); *see also* 47 C.F.R. § 51.305(a)(2). *See MCI Telecommunications Corp. v. Bell Atlantic PA*, 271 F3.d 491, 517 (3rd Cir. Nov. 2001), *petition for cert. filed*, 70 U.S.L.W. 3643 (U.S. Apr. 4, 2002) (No. 01-1477) (stating that "[t]he decision where to interconnect and where not to interconnect must be left to WorldCom subject only to concerns of technical feasibility").

[56] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15609 para. 212 (subsequent history omitted) (encouraging parties and state commissions to identify through negotiations and arbitrations points of technically feasible interconnection).

[57] Although the Commission has previously identified the line-side of a local switch, the trunk-side of a local switch, the trunk interconnection points for a tandem switch, central office cross-connect points, out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases, and the points of access to unbundled network elements as technically feasible points of interconnection, these rules recognize that a particular incumbent LEC's network architecture could impact how interconnection at each of these points is ultimately implemented by two carriers. 47 C.F.R. § 51.305(a)(2).

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

21. As required by the Regulatory Flexibility Act (RFA),[58] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147.[59] The Commission sought written public comment on the proposals in *Second Further Notice*, including comment on the IRFA.[60] We also previously included a Final Regulatory Flexibility Analysis as part of the *Collocation Remand Order.* Appendix B sets forth a Supplemental Final Regulatory Flexibility Analysis for the present *Order on Reconsideration* and *Fifth Report and Order*.

V. PAPERWORK REDUCTION ACT ANALYSIS

22. The actions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 201-03, 251-54, 256, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201-03, 251-54, 256, and 303(r), that the Petition for Reconsideration or Clarification jointly filed by Association for Local Telecommunications Services, e.spire Communications, Inc., KMC Telecom, Inc., McCleodUSA Telecommunications Services, Inc., and NuVox, Inc. September 19, 2001, IS GRANTED to the extent set forth herein.

24. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201-03, 251-54, 256, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-54, 256, and 303(r), that the *Order on Reconsideration* SHALL BECOME EFFECTIVE thirty days after publication of the text or a summary thereof in the Federal Register. The collections of information contained in this *Order on Reconsideration* ARE CONTINGENT upon approval of the Office of Management and Budget.

25. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201-03, 251-54, 256, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201-03, 251-54, 256, and 303(r), that the *Fifth Report and Order* IS ADOPTED.

26. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201-03, 251-54, 256, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-

[58] *See* 5 U.S.C. § 603.

[59] *Second Further Notice*, 15 FCC Rcd at 17864, para. 137.

[60] *Id.*

54, 256, and 303(r), that the *Fifth Report and Order* SHALL BECOME EFFECTIVE thirty days after publication of the text or a summary thereof in the Federal Register.

27. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Order on Reconsideration of Fourth Report and Order, and Fifth Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A -- LIST OF PARTIES

PETITION FOR RECONSIDERATION

September 19, 2001 Petition

1. Association for Local Telecommunications Services; e.spire Communications, Inc.; KMC Telecom, Inc.; McCleodUSA Telecommunications, Inc.; and NuVox, Inc. (Petitioners)

October 19, 2001 Comments

1. Association of Communications Enterprises (ASCENT)
2. AT&T Corp. (AT&T)
3. Qwest Communications International, Inc. (Qwest)
4. SBC Communications, Inc. (SBC)
5. Sprint Corporation (Sprint)
6. Verizon Telephone Companies (Verizon)

SECOND NOTICE OF PROPOSED RULEMAKING

October 22, 2000 Comments

1. @Link Networks, Inc. (@Link)
2. Advanced Telecom Group, Inc. (ATG)
3. Alcatel USA, Inc. (Alcatel)
4. Arbros Communications, Inc., the Association for Local Telecommunications Services, the Competitive Telecommunications Association, e.spire Communications, Inc., Fairpoint Communications Solutions, Inc., Intermedia Communications Inc., KMC Telecom, Inc., NewSouth Communications, Inc., and Pathnet (Arbros Communications, Inc., *et al.*)
5. AT&T
6. BellSouth Corporation (BellSouth)
7. Catena Networks, Inc. (Catena)
8. Cisco Systems, Inc. (Cisco)
9. CompTel (CompTel)
10. Conectiv Communications, Inc. (Connectiv)
11. CoreComm, Inc., Vitts Networks, Inc., and Logix, Inc. (CoreComm)
12. Covad Communications Company (Covad)
13. CTSI, Inc. and Waller Creek Communications Inc. d/b/a Pontio Communications Corporation (CTSI)
14. DSLnet Communications, LLC (DSLnet)
15. Fiber Technologies, LLC (Fiber Technologies)
16. Florida Public Service Commission (Florida Commission)
17. Focal Communications Corporation (Focal)
18. General Services Administration (GSA)
19. Gluon Networks (Gluon)
20. IntraSpan Communications, Inc. (IntraSpan)
21. IP Communications Corporation (IP Communications)
22. LightBonding.com, Inc. (LightBonding.com)
23. McLeodUSA Telecommunications Services, Inc. (McLeod)

24. Metromedia Fiber Network Services, Inc. (Metromedia)
25. Mpower Communications Corp. (Mpower)
26. Network Access Solutions Corporation (NAS)
27. Network Telephone Corporation (Network Telephone)
28. New York State Department of Public Service (New York Commission)
29. Nortel Networks Inc. (Nortel)NorthPoint Communications, Inc. (NorthPoint)
30. Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
31. PF.Net Communications, Inc. (PF.Net)
32. Qwest
33. RCN Telecom Services Inc. (RCN)
34. Rhythms NetConnections, Inc. (Rhythms)
35. Rural Independent Competitive Alliance (RICA)
36. SBC
37. Sprint
38. Supra Telecommunications & Information Systems, Inc. (Supra)
39. Tachion Networks, Inc. (Tachion)
40. The Walt Disney Company (Walt Disney)
41. Telergy, Inc., Adelphia Business Solutions, Inc. and Business Telecommunications, Inc. (Telergy)
42. United States Telecom Association (USTA)
43. Verizon
44. Winstar Communications, Inc. (Winstar)
45. WorldCom, Inc. (WorldCom)

November 14, 2000 Reply Comments

1. Alcatel
2. Arbros Communications, Inc., *et al.*
3. ATG
4. AT&T
5. Aptonix, Ltd. (Aptonix)
6. BellSouth
7. Catena
8. CompTel
9. Focal
10. GSA
11. IP Communications
12. Lucent Technologies, Inc. (Lucent)
13. Metromedia
14. Mpower
15. NAS
16. Network Telephone
17. Qwest
18. Rhythms
19. SBC
20. Sprint
21. Telecommunications Industry Association (TIA)

22. Verizon
23. WorldCom

PUBLIC NOTICE, DA 02-506

March 25, 2002 Comments

1. ASCENT
2. AT&T
3. Qwest
4. Sprint
5. Verizon
6. WorldCom

April 25, 2002 Reply Comments

1. AT&T
2. SBC

APPENDIX B

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),[1] a Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) was incorporated in the *Order on Reconsideration and Second Further Notice of Proposed Rulemaking* (*Order on Reconsideration* and *Second Further Notice*) in CC Docket 98-147.[2] The Commission sought written public comment on the proposals in the *Second Further Notice*, including comment on the Supplemental IRFA.[3] We received comments from The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) specifically directed toward the Supplemental IRFA. These comments were previously addressed fully in the Final Regulatory Flexibility Analysis (FRFA) included as part of the *Collocation Remand Order*, and are addressed only briefly again in Section B, *infra*.[4] This Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Order on Reconsideration and Fifth Report and Order

2. This *Order on Reconsideration and Fifth Report and Order* continues the Commission's efforts to facilitate the development of competition in telecommunications services. In the *Advanced Services First Report and Order*, the Commission strengthened its collocation rules to reduce the costs and delays faced by carriers that seek to collocate equipment at the premises of incumbent local exchange carriers (incumbent LECs). In *GTE v. FCC*, the D.C. Circuit vacated several of those rules and remanded the case to the Commission.[5] In the *Collocation Remand Order,* the Commission addressed the remanded issues. Among other actions, the Commission required incumbent local exchange carriers (incumbent LECs) to provide cross-connects between collocated carriers upon reasonable request. In this *Order on Reconsideration*, we address a petition for clarification or partial reconsideration of that decision. We also address in this *Fifth Report and Order* a number of additional collocation issues raised as part of the *Second Further Notice*. Collectively, these actions will help incumbent LECs and collocated carriers better understand our collocation requirements and how they will be enforced.

B. Summary of Significant Issues Raised by Public Comments in Response to the Supplemental IRFA

3. In the Supplemental IRFA, we stated that any rule changes would impose minimum burdens on small entities, including both telecommunications carriers that request collocation

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (SBREFA).

[2] *Second Further Notice*, 15 FCC Rcd at 17882-87, paras. 26-42.

[3] *Id.* at 17882, para. 26.

[4] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435 at 15496-97, para. 3 (2001) (*Collocation Remand Order*), *aff'd sub nom. Verizon Telephone Cos. v. FCC*, Nos. 01-1371 *et al.* (D.C. Cir., decided June 18, 2002) (*Verizon v. FCC*).

[5] *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000)

and the incumbent LECs that, under section 251(c)(6) of the Communications Act, must provide collocation to requesting carriers. We also solicited comments on alternatives to the proposed rules that would minimize the impact that any changes to our rules might have on small entities.[6] In their comments, OPASTCO stated that the Supplemental IRFA did not provide "the flexibility necessary to accommodate the needs of small [incumbent LECs] and their customers."[7] OPASTCO also stated that the Supplemental IRFA does not specify the specific requirements that might be imposed on small incumbent LECs or the extent to which those requirements might burden small incumbent LECs.[8] Finally, OPASTCO stated that the Supplemental IRFA failed "to describe the 'significant alternatives' for small [incumbent LECs] that [were] presumptively under consideration" in this rulemaking.[9] As noted, we have responded to OPASTCO's comments in our previous *Collocation Remand Order*.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of entities that will be affected by the rules.[10] The RFA defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[11] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[12] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[13]

5. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, which encompasses data compiled from FCC Form 499-A Telecommunications Reporting Worksheets.[14] According to data in the most recent report, there are 5679 service providers.[15]

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[6] *Second Further Notice* at 17886, para. 41.

[7] *See* OPASTCO Comments at 6.

[8] *Id.*

[9] *Id.*

[10] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[11] 5 U.S.C. § 601(6).

[12] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, established one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

[13] 15 U.S.C. § 632.

[14] FCC, Common Carrier Bureau, Industry Analysis Division, *Telephone Trends Report*, Table 5.3 (May, 2002) (*Telephone Trends*).

[15] FCC, Common Carrier Bureau, Industry Analysis Division, *Telephone Trends* at Table 5.3.

These carriers include, *inter alia*, providers of telephone exchange service, wireline carriers and service providers, LECs, interexchange carriers, competitive access providers, and resellers.

6. We have included small incumbent LECs in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[16] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[17] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

7. **Total Number of Telephone Companies Affected.** The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[18] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[19] For example, a personal communications service (PCS) provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the rules adopted herein.

8. **Local Exchange Carriers.** Neither the Commission nor the SBA has developed a definition for small providers of local exchange service (LECs). The closest applicable definition under the SBA rules is Wired Telecommunications Carriers.[20] According to the most recent data, there are 2,050 incumbent and other LECs.[21] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,050

[16] 5 U.S.C. § 601(3).

[17] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR 121.102(b).

[18] U.S. Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[19] *See generally* 15 U.S.C. § 632(a)(1).

[20] 13 C.F.R. § 121.201, NAICS code 513310.

[21] FCC, Common Carrier Bureau, Industry Analysis Division, *Telephone Trends Report*, Table 5.3.

providers of local exchange service are small entities or small incumbent LECs that may be affected by the rules adopted herein.

9. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers.[22] According to the most recent data, there are 229 carriers engaged in the provision of interexchange services.[23] Of these 229 carriers, 181 reported that they have 1,500 or fewer employees and 48 reported that alone, or in combination with affiliates, they have more than 1,500 employees. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are less than 229 small entity IXCs that may be affected by the rules adopted herein.

10. *Wireless Service Providers*. The SBA has developed a definition for small businesses within the two separate categories of Cellular and Other Wireless Telecommunications or Paging. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.[24] According to the Commission's most recent Telephone Trends Report data, 1,495 companies reported that they were engaged in the provision of wireless service.[25] Of these 1,495 companies, 989 reported that they have 1,500 or fewer employees and 506 reported that, alone or in combination with affiliates, they have more than 1,500 employees. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireless service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 989 or fewer small wireless service providers that may be affected by the rules.

D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements

11. The *Order on Reconsideration* imposes nominal changes in projected reporting, record keeping, and other compliance requirements. These changes affect small and large companies equally. The *Fifth Report and Order* imposes no additional changes in projected reporting, record keeping, and other compliance requirements.

12. In the *Order on Reconsideration*, in order to comply with a statutory mandate, we require that an incumbent LEC must include the rates, terms, and conditions under which they provide cross-connects in their federal tariffs. In order to minimize any unnecessary regulatory burdens, however, we make clear that incumbents shall have the flexibility to include their cross-connect offerings in any appropriate federal tariffs.

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[22] 13 C.F.R. § 121.201, NAICS code 513310.

[23] FCC, Common Carrier Bureau, Industry Analysis Division, *Telephone Trends* at Table 5.3.

[24] 13 C.F.R. § 121.210, NAICS Code 513322.

[25] *Telephone Trends Report*, Table 5.3.

13. In the *Order on Reconsideration,* consistent with our existing policy, we allow incumbent LECs the flexibility to use individual case basis (ICB) pricing for cross-connects under specific limited circumstances. We also retain our requirement that incumbent LECs must amend their tariffs to provide for firm rates when those circumstances change. These tariffing requirements give greater certainty to collocators, many of which are small entities, without imposing undue burdens on any incumbent LEC.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[26]

15. In this *Order on Reconsideration*, we clarify that nothing in our prior order disavows any federal jurisdiction we otherwise have under the Act to resolve cross-connect disputes. We also require incumbent LECs, including those classified as small entities, to include their cross-connect offerings in their federal tariffs. In order to minimize any unnecessary regulatory burdens, however, we clarify that incumbents shall have the flexibility to include the rates, terms, and conditions under which they provide cross-connects in any appropriate federal tariffs. In so doing, we implicitly reject, as unnecessarily burdensome, alternatives such as requiring incumbent LECs to file new, stand-alone tariffs for their cross-connect offerings. We also permit incumbent LECs to use ICB pricing in these tariffs in appropriate circumstances. We reject as inconsistent our prior policy the alternative of precluding all use of ICB pricing for cross-connects. Rejection of this alternative ensures that incumbent LECs have an additional measure of flexibility in developing their federal cross-connect tariffs.

16. In the *Fifth Report and Order*, we address the need for a national space reservation policy, the conversion of virtual collocation arrangements to physical collocation arrangements, and whether incumbent LECs may require the use of point of termination (POT) bays. We reject the alternative of adopting more stringent regulations as suggested by some commenters. We conclude that disputes regarding an incumbent LEC's policies on space reservations and the conversion of virtual collocation arrangements should be addressed on a case-by-case basis. We also conclude that while the use of POT bay is permissible, incumbent LECs may not unilaterally compel their use.

F. Report to Congress

17. The Commission will send a copy of the *Order on Reconsideration and Fifth Report and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[27] In addition, the Commission will send a copy of the *Order*,

[26] 5 U.S.C. § 603(c).

[27] *See* 5 U.S.C. § 801(a)(1)(A).

including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order on Reconsideration and Fifth Report and Order* and the Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[28]

[28] *See* 5 U.S.C. § 604(b).

STATEMENT OF COMMISSIONER KEVIN J. MARTIN APPROVING IN PART, CONCURRING IN PART

Re: *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Reconsideration of Fourth Report and Order, and Fifth Report and Order,* ***CC Docket No. 98-147***

I support this Order, which provides further guidance to both ILECs and CLECs on several collocation issues, including cross-connect arrangements. I also support the Commission's effort to act swiftly to provide greater clarity and market certainty to the industry on rules that are essential to the further development of facilities-based competition. I concur, however, with respect to the Order's discussion of the Commission's authority, under section 251(c)(6) of the Communications Act, to require incumbent LECs to install and maintain cross-connects between collocating CLECs.

The United States Court of Appeals for the D.C. Circuit recently affirmed the *Collocation Remand Order*, including the cross-connect requirement. *See Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002). The Court affirmed the Commission, however, on the grounds that the parties challenging the cross-connect requirement had waived their right to challenge the Commission's reliance on section 201(b). The Court did not reach the question of whether the Commission had reasonably invoked section 251(c)(6).

As I have argued elsewhere, I do not quarrel with the Commission's decision to impose cross-connect obligations under section 201, however, its effort to tie the cross-connect requirement to section 251(c)(6) stretches the meaning of that provision too far.[1] The D.C. Circuit flatly reversed the Commission's previous effort to rely on section 251(c)(6) to require ILECs to allow CLECs to provision their own CLEC to CLEC cross connects within ILEC premises. The Court made clear that "Section 251(c)(6) is focused solely on connecting new competitors to [incumbent] LECs' networks." *GTE Service Corp. v. FCC,* 205 F.3d at 423.

Accordingly, for the reasons discussed, I approve the Order except for the part in which the Commission affirms its authority to require cross connects under section 251(c)(6), with respect to which I concur only in the result.

[1] *See* Separate Statement of Commissioner Kevin J. Martin, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Fourth Report and Order, CC Docket 98-147 (adopted August 8, 2001).